United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 76-7452

1-7-77

B P/S

United States Court of Appeals
For the Second Circuit

GERTRUDE J. BONIME and LILLIAN OLDEN,

Plaintiffs-Appellees,

-against-

JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LIMITED,

Defendants-Appellees,

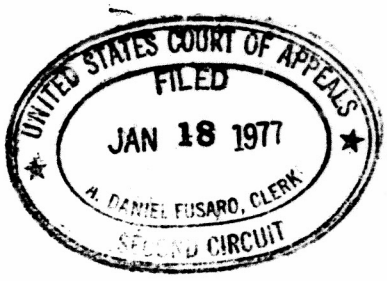
-against-

GUARDIAN MANAGEMENT, S.A.,

Claimant-Appellant,

SAMUEL H. SLOAN,

Member of the Class-Appellant.



On Appeal from the United States District Court Southern District of New York,

BRIEF FOR APPELLANT SLOAN

SAMUEL H. SLOAN
Appellant Pro Se
1761 Eastburn Avenue, Apt. A5
Bronx, New York 10457
(212) 299-2095

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

INDEX

TABLE OF CASES

STATUTES AND RULES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GERTRUDE J. BONIME and LILLIAN OLDEN, Plaintiffs-Appellees, - against - JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LIMITED, Defendants-Appellees, - against - GUARDIAN MANAGEMENT, S.A., Claimant-Appellant, SAMUEL H. SLOAN, Member of the Class-Appellant.	76-7452 76-7456 76-7506

APPELLANT'S BRIEF

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Must this action with respect to the first class period be dismissed because the named representative plaintiff has failed to show that she has suffered any injury?

2. Must this case be remanded to the district court because the judgment was entered prematurely in that the district court improperly postponed the hearings specified in paragraph 15D of the stipulation of settlement and also postponed the resolution of the matter of attorney's fees until after the resolution of this appeal, and as a result this case has not been finally decided and plenary appellate review is not permitted under 28 U.S.C. 1291?

3. Did the district court exceed its authority in entering a judgment which barred the prosecution of any action by any member of the plaintiff class who did not exclude himself from the class from asserting any claim arising from or relating to the matters alleged in the amended complaint?

4. Was the notice of the proposed settlement adequate?

5. Did the district court place impermissible conditions upon the filing of a proof of claim?

6. Did the district court err by permitting the creation of a "tentative settlement class" and adopting notice and opt-out procedures expressly disapproved in the Manual for Complex Litigation?

7. Is this action maintainable as a class action pursuant to Rule 23 Fed. R. Civ. P.?

8. Is the settlement fair and adequate and were the criteria adopted by the district court for determining the fairness of the settlement correct.

9. Should the class be redefined as a condition for permitting this action to proceed as a class action?

STATEMENT OF THE CASE

This is an appeal from a judgment dated July 30, 1976 of the Hon. Morris E. Lasker which was entered after a decision reported as Bonime v. Doyle, 416 F. Supp. 1372 (S.D.N.Y. 1976) and which approved the settlement of a class action. The case arose in the following manner:

On November 29, 1973 the Securities & Exchange Commission ("S.E.C.") instituted an action in the United States District Court for the Southern District of New York against Canadian Javelin Ltd. ("C.J.L."), the Chairman of its Executive Committee, John C. Doyle ("Doyle") and its President, William M. Wismer ("Wismer"). S.E.C. v. Canadian Javelin Ltd., 73 Civil 5074 (LFM).[1]

---

1. That case produced one reported opinion, S.E.C. v. Canadian Javelin Ltd., 64 F.R.D. 648 (S.D.N.Y. 1974) appeal dismissed, 538 F. 2d 313 (2d Cir. 1976), cert. denied, Dkt. No. 76-365 (Dec. 13, 1976).

The complaint of the S.E.C. alleged violations of Sections 5 and 17(a) of the Securities Act of 1933, 15U.S.C. 77e and 77q(a), violations of Section 10(b) and 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 78m(a), and violations of Rules 10b-5, 12b-20, 13a-1 and 13a-13, 17 C.F.R. 240.10b-5, 17 C.F.R. 240.12b-20, 17 C.F.R. 240.13a-1, and 17 C.F.R. 240.13a-13 promulgated thereunder. The complaint demanded an injunction and the appointment of a special receiver. The S.E.C. suspended trading in C.J.L. shares simultaneously with the filing of the complaint.

Four days later, on December 3, 1973, Gertrude J. Bonime ("Bonime"), represented by the law firm of Wolf, Popper, Ross, Wolf and Jones ("Wolf"), instituted this action by filing a complaint alleging violations by the same defendants of the same statute and rules and based upon allegations paralleling those made in the S.E.C.'s complaint. A praecipe was filed by Wolf advising the clerk of the court that this action was "related" to the action brought by the S.E.C. As a result both actions were assigned to the same judge, the Hon. Lloyd F. MacMahon. However, on October 28, 1974 this case was reassigned to Judge Lasker.

On December 11, 1974 Judge Lasker granted a motion to add Lillian Olden ("Olden") as a party plaintiff. On January 17, 1975, after numerous extensions of time commencing on July 18, 1974 had been granted by the court, the plaintiffs moved for a determination that the action may proceed as a class action. (A84).[2] Defendant C.J.L. consented to a preliminary determination of the class "without prejudice to its right to assert, in a subsequent motion, after discovery relating to the class issue, any and all objections that may be appropriate with respect to the issues of class definition and class representation." (A93). On January 23, 1975,

---

2. Hereafter, all such references shall be to the Joint Appendix filed with the clerk of this court.

the plaintiff filed a motion to amend the complaint "on the ground that such an amendment is required in order that all issues between the parties may be fully litigated in this action" (SA17)[3] and to reflect changes arising from the addition of Olden as a plaintiff.

On February 10, 1975 the two motions filed by the plaintiff were granted with a handwritten memo endorsed on the back of the motion papers. The decision on the motion for a class action determination stated: "Motion granted on consent. It is so ordered . . . Lasker, J."[4] The decision on the motion to amend the complaint stated: "There being no opposition, the motion is granted. It is so ordered. Lasker, J."

On July 9, 1975, plaintiff's counsel submitted to the District Court a proposed order (A3) with an affidavit in support (A9) and a consent of the defendants (A8) in further support approving a proposed settlement based upon a stipulation of settlement consented to by the parties (A14-A29) which set forth notice, hearing and opt-out procedures and provided that upon final approval of the settlement, the defendants would agree to pay to the plaintiff class the sum of $1,350,000 in cash or warrants and the action would be dismissed "on the merits with prejudice and without costs" (A6). Judge Lasker signed the proposed order on the same day that it was submitted to him. (A9). The order provided that the matter would be set down for a hearing on October 17, 1975 at 9:30 a.m. "for the purpose of determining whether the proposed Stipulation of Settlement is fair, reasonable and adequate and should be approved by the Court, and said action be dismissed on the merits with prejudice." (A4).

Although the amended complaint alleged that the defendants had manipulated and artificially inflated the common stock of C.J.L. "during the period 1969-1973" (SA7)

---

3. Hereafter, all such references shall be to the Supplemental Appendix filed with the clerk of this court.

4. As far as can be determined from the record, defendants Doyle and Wismer never consented to the class action determination. However, in view of their silence on

and the initial motion for a class action determination defined the class as all persons who purchased shares of C.J.L. between April 30, 1969 and October 25, 1973 (A86), the Stipulation of Settlement divided the class into two sub-classes, the first representing those who purchased shares of C.J.L. from April 30, 1969 through May 31, 1972 and the second representing those who purchased shares of C.J.L. from June 1, 1972 through October 24, 1973, all dates inclusive (A17). The basis for this division was that the plaintiffs alleged that during the "first class period" the price of C.J.L. was inflated due to misrepresentations concerning the construction of a Linerboard Mill in Newfoundland ("the Linerboard Project") (A101) and that during the "second class period" the price of C.J.L. was inflated due to misrepresentation concerning an alleged discovery of copper and the prospective development of a proposed copper mine at Cerro Colorado mountain in Panama ("the Cerro Colorado Project") (A101). Since plaintiff Bonime allegedly purchased her shares of C.J.L. in May, 1970 she was deemed to be the representative of the first class period (A101) and since plaintiff Olden allegedly purchased her shares of C.J.L. in September and October, 1973 she was deemed to be the representative of the second class period (A101).

Under the terms of the Stipulation of Settlement, any member of either class who wished to participate in the settlement was required to file a proof of claim on the form provided for that purpose. Incorporated in this form was a general release which released the defendants

> "from all claims which have been asserted in this action, and all claims and causes of action which might have been asserted in connection with, or which arise out of, any of the matters alleged in this action, whether known or unknown." (A144).

The Stipulation Settlement provided that upon approval the defendants would pay

---

this matter since that date, it must be concluded that they have consented.

$1,350,000 in cash or an equivalent amount of warrants to purchase shares of C.J.L. into a settlement fund with the defendants to determine among themselves how much each would pay (A18), that Wolf would apply for attorneys fees in the sum of $260,000 plus an amount for reimbursement of expenses (A21) and that after the reimbursement of expenses incurred by plaintiff's counsel and the payment of legal fees to plaintiff's counsel (A21) the remainder would be distributed to those class members whose proofs of claim were allowed. The Stipulation of Settlement further provided that if the amount in the settlement fund was insufficient to satisfy the allowed claims, then the fund would then be distributed on a pro rata basis with one third of the amount in the fund allocable to the claims of the class members who made purchases of C.J.L. during the first class period and two-thirds allocable to the claims of the class members who made purchases of C.J.L. during the second class period. (A20). The pro rata distribution would be in accordance with the loss sustained by each class member whose claim was allowed. The term "loss" was defined in paragraph; 7 of the Stipulation of Settlement which stated:

> "The claim of each class member who has sustained a loss shall be determined in the following manner. With respect to all shares purchased during the first period, the claim shall be the difference between the purchase price of the shares and the greater of (i) the selling price of the shares or (ii) the closing price of the stock on the American Stock Exchange on the first day of trading after May 31, 1972. With respect to all shares purchased during the second period, the claim shall be the difference between the purchase price of the shares and the greater of (i) the selling price of the shares or (ii) the closing price of the stock on the first day trading was resumed on the American Stock Exchange after October 24, 1973. Any profit from a sale in the period from April 30, 1969, to and including the date of mailing of the notice of hearing hereinafter provided for, of Canadian Javelin common stock purchased during either the first or second class periods, shall be deducted from losses in computing the claim of each class member." (A19-A20)

Although not stated in the Stipulation of Settlement or in the decision subsequently handed down by Judge Lasker, the key figures incorporated in the Stipulation of Settlement were 10 3/8 which was the closing price of C.J.L. on the first day of trading on the

American Stock Exchange after May 31, 1972 and 7 1/8 which was the closing price of C.J.L. on the first day of trading on the American Stock Exchange after October 24, 1973. (A272). The respective dates in question were August 10, 1972 and January 27, 1975. (A246). This occurred because the S.E.C. suspended trading in C.J.L. from March 7, 1972 through August 9, 1972 (A281) and trading was suspended by the American Stock Exchange on October 25, 1973 and by the S.E.C. on November 29, 1973 and these two suspensions did not terminate until January 26, 1975. See Sloan v. S.E.C., slip. op. 555, 559 (2d Cir. Nov. 18, 1976). Thus, a person who purchased 100 shares of C.J.L. in July, 1969 at 14 7/8, the average price during that month (A278), and sold 100 shares at 8 in July, 1970, the average price during that month (A279), would have a loss, as defined by the Stipulation of Settlement, of $450 which equals 100 x (14 7/8 - 10 3/8) rather than $687.50 which equals 100 x (14 7/8 - 8). Also a person who purchased 100 shares at 12 3/8 and 100 shares at 8 3/8 during the first class period and who sold prior to the mailing of the notice the second 100 shares at 10 3/8, would have no loss regardless of whether or not the first 100 shares had been sold[5] and irrespective of the price at which they were sold since such a person would have a profit of $200 on the purchase at 8 3/8 and would have an offsetting loss of a maximum of $200 on the purchase at 12 3/8, with the net result being neither a profit nor a loss which would extinguish any right to participate in the Settlement Fund. Similarly, a person who bought 100 shares at 8 during the first class period and who sold those shares at 10 3/8 prior to the mailing of the notice and

---

5. It is possible that for income tax purposes such a person had previously declared that the sale of 100 shares was against the purchase at 8 3/8 rather than against the purchase at 12 3/8 in order to avoid taking a tax loss until a year when it could be used to offset a taxable profit.

then bought 100 shares at 9 1/2 during the second class period which was not sold would have neither a profit nor a loss since the 2 3/8 point loss during the second class period would be offset by the 2 3/8 point profit during the first class period.

To take an actual example in this case, plaintiff Bonime based her claim on the purchase of 400 shares of C.J.L. at 8 3/8 on May [illegible], 1970. (SA54). Since 8 3/8 is less than 10 3/8, Bonime does not have a loss as defined by the Stipulation of Settlement and hence has no right to participate in the Settlement Fund.

As provided for in the Stipulation of Settlement a "notice of a proposed class settlement" (A39), signed and approved by the court (A48), with a form for filing a "proof of claim and release" (A49), was mailed to approximately 30,000 persons who purchased shares of C.J.L. "during the relevant period." (A55). Approximately 4000 claims were filed (A256) along with, according to the court's subsequent decision, 416 F. Supp. at 1378, objections by eleven objectors. This appellant, Samuel H. Sloan ("Sloan"), was among those eleven objectors (A164) and indeed was the first to file an objection. (A58).

The objections filed by this appellant, who identified himself as a purchaser of C.J.L. shares during the second class period, were principally that (1) he was unable to make an informed decision as to whether to file a proof of claim or instead exclude himself from the class (A60, A66) (2) that this action cannot be maintained as a class action pursuant to Rule 23 Fed. R. Civ. P. (A58, A69) and (3) that plaintiff's counsel had engaged in unethical practices and were not entitled to recover the legal fee of $260,000 for which they had expressed an intention to apply (A64). The notice of appearance filed by this appellant also stated:

> "PLEASE TAKE FURTHER NOTICE that the undersigned demands that all papers and briefs filed in this action be served upon him at his address at 917 Old Trents Ferry Road, Lynchburg, Virginia 24503." (A58).

In spite of this demand, none of the papers filed in this action were served on this appellant including an affidavit which purported to set forth an answer to the objections of this appellant. (A164, A170). For this reason, this appellant was left in the dark as to the progress of the proceedings which extended for more than one year from the date of mailing of the July 9, 1975 notice until the entry of the Judgment on August 9, 1976. (A305).

The decision subsequently rendered by Judge Lasker devoted most of its attention to objections made by Robert Plotkin ("Plotkin"), who was not a purchaser of C.J.L. shares during either the first or the second class period but rather who was an attorney who had filed two class actions in Chicago, one in an Illinois state court and the other in federal court seeking to recover for a nearly identical class. Plotkin's desire was to represent the class he had formulated but since he had been unable to obtain a class certification in either of the actions he had filed in Chicago he sought to upset the proposed settlement in the Bonime class action or else to obtain a postponement of any ruling by Judge Lasker until he could obtain a class determination in Chicago. (A200). The papers filed by Plotkin in opposition to the settlement were voluminous and comprise a substantial portion of the 7 volume record of this appeal. Apparently, reading these papers so burdened Judge Lasker that eventually, upon receipt of a reply affidavit from one of Plotkin's co-counsel, Judge Lasker entered an order directing that no further papers be proffered for filing (A223) and refused to accept for filing the papers which Plotkin's co-counsel had already submitted. (A243-A245).

On June 23, 1976 an article appeared on page 16, col. 4 of the Wall Street Journal which stated that the financial situation of C.J.L. had deteriorated to the point that it had only enough money to cover the next two payrolls. Seven days later, on June 30, 1976, Judge Lasker approved the proposed settlement.

On August 9, 1976 a judgment was entered. (A305). However, the entry of

the judgment did not end the litigation at the district court level because Judge Lasker left unresolved the question of the amount of legal fees and expenses payable to plaintiff's counsel and also left unresolved all questions related to disputed or disallowed claims filed by claimants even though, under the terms of paragraph 15D of the Stipulation of Settlement (A27), all claimants whose claims were disallowed were entitled to a hearing before the District Court concerning their rejected claims. It appears that Judge Lasker will not conduct this hearing until after this appeal has been decided even though he has jurisdiction to do so in accordance with paragraph 11 of the judgment. (A305).

SUMMARY OF ARGUMENT

Since plaintiff Bonime suffered no loss as defined by the Stipulation of Settlement, this action with respect to the first class period must be dismissed. Since the District Court has not made a final determination of this action, and in particular has not made a decision as to whether to allow the claim filed by this appellant and by other members of the plaintiff class, this case should be remanded to the District Court with instructions to conduct the hearings provided for in the Stipulation of Settlement. A district court lacks the authority to bar and enjoin all members of the plaintiff class who did not exclude themselves from participating in the settlement from prosecuting any action of any sort based upon any circumstances arising from or relating to the matters alleged in the amended complaint and hence the judgment of the District Court must be vacated or modified. The notice which was mailed to the members of the plaintiff class was inadequate in that although it referred to the Stipulation of Settlement it did not state what the terms of the Stipulation of Settlement were. It did not inform the members of the class that the "loss" suffered by each class member who filed a claim would be calculated in such a way as to prohibit many members of the class from participating in any recovery. The notice was also inadequate in that it failed to provide the plaintiff class with any infor-

mation to aid in a determination of how much each member of the class would get if the settlement were approved. Moreover, the notice was misleading in that it failed to state that no part of the Settlement Fund would be provided by defendants Doyle and Wismer, although this fact was known to counsel for the parties at the time the notice was sent out. In addition, the notice created the misleading impression that the settlement would be likely to be paid in warrants which would have been worthless at the time the notice was mailed because C.J.L. was then suspended from trading by the S.E.C. The proof of claim form mailed to the class members placed impermissible conditions upon the filing of a proof of calim. It required that those who wished to participate in the Settlement Fund must agree to be bound to the terms of any judgment entered upon the Stipulation of Settlement, a copy of which was not provided to the members of the class, and that those filing a proof of claim must sign an agreement releasing the defendants and all "past and present officers, directors, employees, agents, attorneys, subsidiaries and affiliates" of C.J.L. from any claim for any liability arising out of any matter alleged in the action "whether known or unknown." The submission of this proof of claim required the making of a sophisticated legal judgment and therefore placed an inappropriate condition on participating in the settlement. This was particularly true since this case involves a class where most members have presumably suffered a loss amounting to only a few hundred dollars. In a class action such as this it was error for the District Court to permit the creation of a "tentative settlemnt class" and to adopt notice and opt-out procedures disapproved of in the Manual for Complex Litigation. This action may not be maintained as a class action pursuant to Rule 23 Fed. R. Civ. P. The individuals who purchased the stock of C.J.L. over a period of more than five years at a variety of different prices under a variety of different circumstances have little in common with each other and cannot be combined to form an appropriate

class. A class of this size is unmanageable and it would be impossible to treat all the members of this class fairly. Moreover, it is apparent from the court filings by plaintiff's counsel in support of the proposed settlement that plaintiff's counsel is incapable of adequately representing the interests of anyone other than those who purchased shares of C.J.L. after June 22, 1973. The settlement was not fair and adequate and the criteria adopted by the district court for determining the fairness of the settlement were not correct. The court should have directed plaintiff's counsel to make a tabulation of all proofs of claim actually filed and to calculate how much in the way of damages was being claimed by the members of the plaintiff class who had filed claims and in this way the court could have avoided the guessing game indulged in by the proponents and opponents of the settlement and thereby made a rational determination as to whether the settlement was adequate. This court should resolve this appeal by vacating the judgment and remanding the action to the District Court with instructions that a class action may proceed only upon the condition that the plaintiff's counsel agree to represent those persons who purchased shares of C.J.L. from June 22, 1973 to October 24, 1973 inclusive since this is apparently the only time period for which plaintiff's counsel is capable of adequately representing the class.

ARGUMENT

POINT I

THIS ACTION WITH RESPECT TO THE FIRST CLASS PERIOD MUST BE DISMISSED BECAUSE PLAINTIFF BONIME HAS FAILED TO DEMONSTRATE THAT SHE HAS SUFFERED ANY INJURY.

The proof of claim filed by plaintiff Bonime in accordance with the Stipulation of Settlement shows that she purchased 400 shares of C.J.L. at 8 3/8 on May 27, 1970. (SA 53). However, paragraph 7 of the Stipulation of Settlement defines the term "loss"

as the price paid for the shares of C.J.L. minus the price for which those shares were sold or the closing price on the American Stock Exchange on the first day of trading after May 31, 1972, whichever is greater. Since, according to her proof of claim, Bonime did not sell her shares and since the closing price on the American Stock Exchange on the first day of trading after May 31, 1972 was 10 3/8, it follows that Bonime has a profit of $800 on her purchases as defined by the Stipulation of Settlement and hence is not entitled to participate in the settlement fund. This circumstance requires the dismissal of this action as it concerns the first class period inasmuch as Bonime has sued as the representative of those persons who purchased shares of C.J.L. during that period.

The question involved here has been litigated in a number of cases, among them Leonard v. Merrill, Lynch, 64 F.R.D. 432, 434-435 (S.D.N.Y. 1974) where Mr. Kornreich of the Wolf firm who is counsel for the plaintiff class here, was perhaps not coincidentally representing one of the plaintiffs there. The contention advanced by Mr. Kornreich in that case was that even though his client had suffered no injury resulting from the actions of the defendants, his client could nevertheless sue as the representative of those persons who did suffer injury because of the actions of the defendants This contention was resoundingly rejected by Judge Pierce. Other courts have arrived at the same result. See e.g. Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 694-701 (E.D. Pa. 1973); Haas v. Pittsburgh National Bank, 60 F.R.D. 604, 610-615 (W.D. Pa. 1973), aff'd., 526 F. 2d 1083 (3d Cir. 1976).

Although Mr. Kornreich did not appeal the adverse decision in Leonard v. Merrill, Lynch, supra, he apparently is prepared to litigate in this court the question resolved against him there as evidenced by his prosecution of this suit. However, perhaps it would be more accurate to state that Mr. Kornreich hopes to sneak this case through the courts without anyone becoming aware that his representative plaintiffs suffered no injury

and therefore cannot be a member of the class which they purport to represent. The procedures set forth in the Stipulation of Settlement which were proffered by the Wolf firm and accepted by the District Court, have the effect of leaving counsel for the respective parties in control of the course of the proceedings with little or no active supervision by the court. For this reason, there is no mechanism whereby Judge Lasker could ever become aware in the normal course of the fact that plaintiff Bonime has no right to participate in the Settlement Fund. The approximately 4000 verified proofs of claim which have been filed, not counting 32 unopened claims which are presently in the files of the Clerk of the District Court with nobody other than this appellant apparently aware of their presence, are now in the custody of one of the defendant's counsel (see A94), and counsel for the respective parties have in general refused to permit any objectors to examine them. (A199, A214, A220). Indeed, it was only after persistent inquiries by this appellant that he was permitted to see the Bonime claim and to this day this appellant has not been permitted to learn whether or not the other plaintiff, Olden, ever filed a claim. This appellant has asked Mr. Kornreich of the Wolf firm directly if Olden filed a claim and Mr. Kornreich has flatly refused to give a yes or no answer to this question.

It is clear that if Ms. Olden did not file a claim, this entire action must be dismissed. The Supreme Court made this clear recently in Simon v. Eastern Ky. Welfare Rights Org., ___U.S.___, 48 L. Ed. 2d 450, 461 n. 20 (June 1, 1976) where it stated:

> "That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' Warth v. Seldin, 422 U.S. 490, 502 (1975)."

In Warth v. Seldin, 422 U.S. 490, 501-502 (1975) the Supreme Court stated:

> ". . . it is within the trial court's power to allow or to require the plaintiff

> to supply, by amendments to the complaint or by affidavits, further particularized allegations of fact deemed supportative of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed."

In this case, in order to show that they were entitled to participate in the Settlement Fund, plaintiffs Bonime and Olden were required to file a proof of claim. If they did not do so or if the proof of claim they filed shows that they suffered no loss as defined by the Stipulation of Settlement, there can be no question that this action must be dismissed. It is appropriate to point out that the only allegation in the amended complaint which identifies the plaintiffs is paragraph 3 of the amended complaint which states (SA 24):

> "3. Plaintiff's purchased common stock of the Company during the period in which the wrongful conduct complained of herein was committed and continued."

Had the defendant's counsel chosen to defend more vigorously, this pleading would no doubt have been vulnerable to a motion to dismiss. However, the defendant's counsel consented at every step of the way to whatever the plaintiff's counsel wanted. For this reason and, in the opinion of this appellant, due to the erroneous procedures adopted by the District Court which involved little judicial supervision and which gave the objectors no opportunity to inquire into these matters, the District Court was never confronted with the issue now being presented to this appellate court. However, standing is a jurisdictional requirement and since Bonime has no standing and cannot adequately represent the class of persons which she purports to represent, this action must be dismissed with respect to allegations concerning the first class period. Hopefully, plaintiff's counsel will, by the time of the argument of this appeal, provide information about whether Olden filed a claim and the nature of the claim, if any, which Olden filed. If that is done this court can dispose of this appeal in an appropriate manner. The remainder of this brief is premised upon the assumption that Olden did file a claim,

since otherwise this court need not reach any further questions.

POINT II

THIS ACTION MUST BE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS WHICH SHALL INCLUDE A HEARING TO DETERMINE WHETHER THE REJECTED CLAIMS WILL BE DISALLOWED AND TO DETERMINE THE AMOUNT OF ATTORNEY'S FEES AND EXPENSES TO BE RECOVERED BY PLAINTIFF'S COUNSEL OUT OF THE SETTLEMENT FUND.

Paragraph 15D of the Stipulation of Settlement, which was consented to by the parties and which was referred to frequently in the notice which was sent to the class members, states the following (A26-A27):

> "If any proof of claim is rejected, in whole or in part, Notice of Rejection thereof shall be given to the person filing said proof of claim no later than 20 days after the last day for filing of proofs of claim, advising said claimant of the reason for such rejection and of the right to a hearing thereon. Within 30 days after the date of mailing of such Notice of Rejection, the class member may file with the Court a written request for a hearing, and a copy of such request shall be mailed to Wolf, Popper, Ross, Wolf & Jones; Diamond & Golomb, P.C. and Moses Krislov, on or before the date it is filed with the Court. In the event that no such request for hearing is received within said 30 day period, the class member shall be deemed to have consented to rejection of his proof of claim. Notice of all hearings upon any claim relating to participation in the Fund shall be given by the Court to counsel for all parties."

Counsel for the appellees would like to have this Court believe that this appellant is the only one sufficiently dissatisfied with the proceedings in the District Court to prosecute an appeal. In order to create the illusion that only Samuel H. Sloan, among 4000 claimants, wishes to protest the District Court's decision, the appellees have successfully negotiated with two other parties who filed notices of appeal and as a result stipulations have been entered which leave this appellant alone in this appeal. Counsel for the plaintiff class, who is familiar with prior decisions of this Court in appeals brought by this appellant, apparently believes that this Court will give little consideration to the arguments advanced by this appellant and the decision of Judge Lasker will be affirmed; and that once this occurrs, the decision of this appellate

court will establish the law of the case and will bind future panels of this court who may, and no doubt will, hear other appeals brought in this case. It is submitted that this strategy should not be permitted to succeed. In 28 U.S.C. 1291 is embodied the Congressional intent that, with limited exceptions, the Court of Appeals should hear only appeals from a final judgment "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945) cited in International Controls Corp. v. Vesco, 535 F. 2d 742, 747 (2d Cir. 1976).

The Judgment of the District Court left unresolved two matters, and these matters are of such pervasive importance that it can fairly be stated that this litigation may have only commenced, much less be near its conclusion. One matter left unresolved concerned the question of the fees and expenses payable to plaintiff's counsel, who have expressed an intention to apply for a fee of $260,000 and for the reimbursement of expenses in an amount as yet unspecified. The summary of the decision of the District Court as reported in the Federal Supplement, 416 F. Supp. at 1372, makes it appear that the claim for attorneys fees in the amount of $260,000 has already been allowed. This is not the case and in fact no formal fee application has been filed. Plaintiff's counsel have indicated that they intend to include in their fee application a request for attorneys fees generated in connection with responding to this appeal. It is submitted that such a request, if made, could not be properly allowed since it would have a chilling effect on the right of a person to appeal from a decision approving a proposed settlement of a class action. This is particularly true in cases involving law firms such as that of Wolf, which have been known to request fees amounting to $200 per billable hour or even more. The request by the Wolf firm for an unspecified amount of out-of-pocket expenses is also likely to be substantial. Plaintiff's counsel has made an ostentatious display of its supposedly substantial efforts to benefit the plaintiff class by including

in the application for approval of the proposed settlement references to trips to Nassau, Bahamas, Washington, D.C., and Chicago, Illinois. (A100, A102).[6] Thus, the out of pocket expenses for which reimbursement is requested may come to a considerable sum of money which may substantially diminish the amount of the Settlement Fund remaining to satisfy the claims of the plaintiff class. Indeed the amount may be diminished to such a great extent as to provoke other appeals.

It is noteworthy that in the decision upon which Judge Lasker places reliance, City of Detroit v. Grinnell, 495 F. 2d 448 (2d Cir. 1974), the Court of Appeals reversed the decision of the District Court solely on the question of counsel fees. That case is now back before this Court in another appeal, City of Detroit v. Grinnell Dkt. No. 76- 7252 , and the sole question presented in this appeal is whether the award of counsel fees was excessive. Meanwhile, although the settlement of the class action was approved by the District Court in 1972, see City of Detroit v. Grinnell, 356 F. Supp. 1380 (S.D.N.Y. 1972) not a nickel has been paid to the plaintiff class or its attorneys during the intervening period of more than four years.

It is clear that this court should avoid piecemeal appeals and protracted litigation to the detriment of all parties, except possibly plaintiff's counsel. Therefore, this court should remand this case to the District Court for a final resolution of all open matters so that all parties who wish to appeal can appeal at the same time. This is particularly true since there is a matter even more critical to the interests of this appellant and to the interests other potential appellants which has been left unresolved, and that concerns whether certain proofs of claim which have been rejected principally by plaintiff's counsel will be allowed by the District Court.

---

6. It is noteworthy, however, that amidst all this traveling, plaintiff's counsel did not travel to either Panama or Canada where some first hand information might have been obtained concerning the strength of the plaintiff's case.

This appellant has submitted a proof fo claim which defendants' counsel have indicated a willingness to accept but as to which the plaintiffs' counsel may have some as yet unstated objection. In fact, this appeal would not have been perfected had plaintiff's counsel agreed to the acceptance of this proof of claim. The issue seems to concern primarily the fact that this appellant submitted a proof of claim which crossed out sentences in the proof of claim form which this appellant considers to be objectionable. These sentences are:

> "Claimant submits this Proof of Claim under the terms of the Stipulation of Settlement dated July 9, 1975, and claimant submits to the jurisdiction of the United States District Court for the Southern District of New York with respect to his claim and agrees to be bound by and subject to the terms of any judgment that shall be entered upon the Stipulation of Settlement.
>
> In consideration of participating in the settlement claimant does by these presents for himself, his heirs, executors, administrators, successors and assigns, remise, release and forever discharge defendant Canadian Javelin Limited and its past and present officers, directors, employees, agents, attorneys, subsidiaries and affiliates and defendants John C. Doyle and William M. Wismer, and their heirs, representatives, agents, attorneys and successors, from all claims which have been asserted in the action, and all claims and causes of action which might have been asserted in connection with, or which arise out of, any of the matters alleged in the action, whether known or unknown.

The objection this appellant has to signing a proof of claim form which includes these two sentences are (1) that if this appellant were to agree to be bound by any judgment entered upon the Stipulation of Settlement, he would in effect become signatory to the Stipulation of Settlement and he would waive any right to object to the settlement or to appeal from any judgment entered approving the settlement and (2) if this appellant were to sign a general release concerning any claim he might have against the numerous entities listed in the second objectionable sentence, he might, if his claim is rejected by the District Court, be caught in the situation where he cannot participate in the Settlement Fund and at the same time cannot start his own suit against the named defendants and the other named persons and entities due to having signed a general release.

As to the first point, it should be stated that plaintiff's and defendants' counsel

are in disagreement as to the legal effect of signing a proof of claim. The plaintiff's counsel maintain that any person who submits a verified proof of claim on the form provided has lost his right to object and to appeal from any judgment entered upon the Stipulation of Settlement. On this basis, plaintiff's counsel moved to dismiss the appeal of Guardian Management Corp. "for lack of standing." This motion was denied by this court. Defendant's counsel, who did not join in that motion, contend to the contrary that a class member can file a proof of claim and at the same time object. This difference of opinion presents an issue which this Court may find it appropriate to resolve in this appeal. It is sufficient to point out here that plaintiff's counsel and defendant's counsel do not speak with one voice on this issue.

In any event, this appellant would like to present to the District Court his arguments that his proof of claim should be accepted. Incidentally, the amount involved here is substantial since during the second class period this appellant purchased 46810 shares of C.J.L. which shares were sold[7] for a total loss, as defined by the Stipulation of Settlement, of 123,643.51.[8]

The reason that this appellant has not presented to the District Court the question of whether his claim is to be allowed, lies in the procedures set forth in the Stipulation of Settlement. The terms of the Stipulation of Settlement puts counsel for the parties, and most particularly the plaintiff's counsel, since they are the ones who are prosecuting this suit, in virtual control of the course of the proceedings.

---

7. Actually, the sales in question occurred prior to the purchases which is another way of stating that the sales were all short sales. However, this appellant is clearly a purchaser and member of the class as defined by the Stipulation of Settlement and the fact that his purchase of C.J.L. shares was to cover short sales does not affect this result. Counsel for the plaintiff class has indicated that it might object to permitting this appellant to participate in the Settlement Fund on the ground that this appellant was a short seller. However, this objection has not yet been made and if made would clearly have no legal basis.

8. Initially, this appellant estimated his losses at $170,000. However, this figure included commissions which were considerable in view of the volume of trading

As a result Judge Lasker has not conducted the hearings specified in paragraph 15D of the Stipulation of Settlement because he has not been officially informed by counsel for the parties that any requests for a hearing have been made. The procedure adopted by the District Court was that all mail from the class members, although addressed to the Clerk of the Court, would be picked up by the defendant's counsel and would not be docketed. Thus, there is nothing on the docket to show that a large number of class members have had their claims rejected, have made a timely request for a hearing, are waiting for a hearing to be scheduled, and have not been notified that a judgment has been entered and this case is pending on appeal.

The fact is that none of the objectors, with the exception of Plotkin (A350), were notified of the decision of the District Court and of the entry of the judgment. This appellant first learned of the signing of the judgment by calling Judge Lasker's chambers long after it had been entered. Had this appellant remained uninformed about the judgment a few days longer, it would have been impossible for him to take this appeal. No doubt other objectors would be appealing too if they knew that a judgment had been entered. More significantly, this court can be certain that there are a number of claimants who will appeal if their claims are not allowed by the District Court. One of these certain appeals would come from Guardian Management Corp., which took an appeal from the judgment entered on August 9, 1976 but which withdrew its appeal via a stipulation, approved by Judge Mulligan of this court, which gave it the right to refile its appeal if its claim were finally rejected by the District Court. This appellant would have been willing to withdraw his appeal on much the same basis, but plaintiff's counsel was not willing to enter into a stipulation with this appellant similar to the stipulation that it entered into with Guardian Management Corp.

---

in C.J.L. shares by this appellant. The Stipulation of Settlement does not permit commissions to be included in calculating the loss. (A19).

It appears that the largest, in terms of dollar amount, of claims which have been filed by members of the class have been rejected by plaintiff's counsel. These claims were in all cases filed by entities which exist in foreign jurisdictions, such as Guardian Management Corp., which is the Panamanian equivalent of a brokerage firm. Guardian's customers, in whose behalf its claim was filed, purchased C.J.L. shares on the Montreal and Vancouver Stock Exchanges during the second class period. Some of these purchases occurred when C.J.L. was suspended from trading by the S.E.C. This appellant believes that on the authority of cases such as I.I.T. v. Vencap, Ltd., 519 F. 2d 1001, 1016-1017 (2d Cir. 1975); Bersch v. Drexel Firestone Inc., 519 F. 2d 974, 993 (2d Cir. 1975) and Racaman v. Barish, 408 F. Supp. 1189, 1194 (E.D. Pa. 1975), Guardian Management Corp. and other entities and persons which have no presence in the United States, may not participate in the Settlement Fund. Since the bulk of the purchases of C.J.L. shares during the second class period appear to have been made by foreign nationals, the position of this appellant is that if his claim is accepted and if the claims of all foreign nationals are accepted, then he will r satisfied and will wish to appeal. Thus, it is possible that the District Court will make a ruling which will result in no appeal being taken by this appellant. However, because of the refusal of plaintiff's counsel to request from the District Court an immediate ruling on the issues in question, and because of the procedures adopted in this case which put the plaintiff's counsel in virtual control of the course of proceedings, this appellant has no choice but to prosecute this appeal in order to preserve his objections to what the District Court did, even though this appellant finds himself in a position where if he wins the appeal, the decision of this court may ultimately be to his detriment; but if he loses this appeal, the decision of this court may ultimately be to his benefit.

As the Supreme Court stated in Catlin v. United States, supra a final judgment "is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." In order for this criteria for a final judgment to be met

in this case, all the claims would have to be tabulated, all hearings on whether the rejected claims were to be allowed would have to be held, and all attorneys fees and other fees and expenses would have to be computed and a final list would have to be drawn up showing how much each person was supposed to get, and only after all this was done and approved by the court, would a final judgment be entered from which any dissatisfied person could appeal. That is the only appropriate course in this case if this court wishes to avoid endless appeals. The attorneys for the respective parties have protested vigorously the expense and effort involved in such a tabulation and computation. (See e.g. A204, A221). However, plaintiff's counsel filed suit knowing that if the suit were successful eventually such a computation would have to be made. Moreover, defendants counsel expressly agreed in the Stipulation of Settlement that C.J.L. would bear the cost of such a tabulation and computation (A20). In view of these factors and the pending request by plaintiff's counsel for an attorneys fee of $260,000, this court should look with disfavor upon any protest by the parties' counsel about the amount of work and effort counsel for the respective parties will be put to. Therefore, this court should, without otherwise expressing a view as to the merits of this appeal, remand this case to the District Court with instructions to conduct all further proceedings necessary to the entry of a final judgment.

POINT III

THE DISTRICT COURT EXCEEDED ITS AUTHORITY BY ENTERING A JUDGMENT WHICH BARRED AND ENJOINED ANY MEMBER OF THE PLAINTIFF CLASS WHO DID NOT OPT OUT FROM INSTITUTING OR PROSECUTING ANY ACTION ASSERTING ANY CLAIMS ARISING FROM OR RELATING TO THE MATTERS ALLEGED IN THE AMENDED COMPLAINT.

The judgment entered by the District Court contains the following provision:

"10. All persons who are members of the class and who have not opted out in accordance with the procedures set forth in the notice of a class action determination referred to above or who have not otherwise been permitted by the Court to opt out (including persons who have filed claims which were rejected

by the parties and who did not timely request a hearing thereon, and those who filed claims and requested such hearing) are permanently barred and enjoined from instituting or prosecuting either directly or representatively any action asserting claims which have been or might be asserted arising from or relating to the matters alleged in the Amended Complaint."

When one reads the affidavit of Benedict Wolf in support of the proposed settlement (A95-A133) it seems at first that plaintiff's case is so abysmally weak, with exception of the period subsequent to June 22, 1973 (A130), that it is hard to see why the defendants would agree to settle this case by the payment of an amount as substantial as $1,350,000. However, the reason the defendants are as eager to settle as they are is apparent from the above quoted provision of the judgment. If the judgment entered in this case is allowed to stand, the defendants and all other persons will be virtually immune from suit by any person based upon a cause of action arising from the purchase of C.J.L. shares from April 30, 1969 through October 24, 1973. Indeed, the language of paragraph 10 of the judgment might be stretched to the point of enjoining the prosecution by this appellant of the proceeding successfully prosecuted in Sloan v. S.E.C., supra, where this court declared that the suspension of trading in C.J.L. shares by the S.E.C. for a period exceeding ten days was illegal. Since this appellant based his claim to standing in part on his short sales of C.J.L. shares, it might arguably be stated that that proceeding asserted a claim "which might have been or might be asserted arising from or relating to the matters alleged in the Amended Complaint." (A305).

Of course, it is obvious that the District Court did not intend that the language of its judgment would be stretched so far. However, the point is that the broad wording of the provision of the judgment which contains a bar could properly be construed as precluding the prosecution of a variety of actions and therefore could have undersirable effects which cannot be foreseen at this time. For example, the last page of the decision of the District Court states:

"We note that if the decision of the company to pay the entire amount is the result of improper machinations by the individual defendants, the wrong is redressable by a shareholders action."

However, a shareholders derivative action would almost certainly be barred by paragraph 10 of the judgment since it would be prosecuted "either directly or representatively" and would arise from or be related to the matters alleged in the amended complaint.

When Wolf's motion to dismiss the appeal of Guardian Management Corp. was argued orally before this Court, Judge Anderson remarked that it was "very unusual" to include a bar of this sort in this kind of judgment. This assessment is correct. It is worth pointing out that in spite of the fact that approximately 30,000 notices were mailed to members of the plaintiff class, there are almost certainly some class members whose identities or addresses were unknown and who did not read the editions of the New York Times, the Wall Street Journal or the Toronto Globe and Mail in which the notice of the class action determination was published (A136). Yet these persons, who do not even know that this lawsuit is pending, along with those persons who do know that this lawsuit is pending but have not read the judgment, are barred and enjoined from prosecuting certain actions without even knowing about it. Clearly, a district court lacks the authority to enter this kind of an injunction.

In the recent case of Herbst v. I.T.&T., CCH Fed. Sec. Law Rep. par. 95,696 at p. 90,436 (current binder) (D. Conn. Aug. 11, 1976) the District Court refused to approve a proposed settlement of a class action which was satisfactory in every other respect because of the existence of a provision for a bar which was similar to the bar which is incorporated in the judgment entered here. For the reasons given by the district court in that decision, the judgment entered in this case should be vacated. The issue raised here could be resolved readily if the parties would agree to modify the judgment by striking paragraph 10. However, it may be that they will refuse to do so because of the feeling that what they have purchased in return for agreeing to

pay $1,350,000 into the Settlement Fund is immunity from any kind of suit based upon trading in C.J.L. shares from April 30, 1969 through October 24, 1973. It therefore seems possible that if such immunity could not be had, the defendants would no longer be willing to settle.

POINT IV

THE NOTICE OF THE PROPOSED SETTLEMENT WAS INADEQUATE AND THE NOTICE, OPT-OUT AND TENTATIVE SETTLEMENT CLASS PROCEDURES ADOPTED BY THE DISTRICT COURT WERE ERRONEOUS AND THE DISTRICT COURT ERRED IN FAILING TO REQUIRE SERVICE OF ALL FILED PAPERS UPON THE OBJECTORS.

This case presents, if this court reaches it, the question of whether procedures which are expressly disapproved of by the Manual for Complex Litigation are to be permitted generally in this Circuit. These procedures, which were substantially followed by Judge Lasker, and the problems which following these procedures create, are best described by quoting from pages 1555-1558 of the May, 1976 Harvard Law Review:

> "(a) The Problem of the Tentative Settlement Class. -- The most elaborate settlement mechanism developed for class actions is the tentative settlement class, in which the parties negotiate the definition of the class as well as the content of the relief. After agreement is reached the judge is asked to give preliminary approval and to authorize notice to class members, informing them of the terms of the settlement and, in effect, giving them four options: to opt-out; to accept the settlement and file a claim; to file a claim and remain in the class but to protest the settlement at a final approval hearing; or to do nothing, in which case they are bound without the chance to share in the recovery. The judge then holds a final hearing and rules on the appropriateness of the class definition and the adequacy of the settlement. If the judge rejects the proposal, or if an unexpectedly large number of class members opt out, the defendant may renounce his class stipulation and either oppose class treatment altogether or argue for a narrower definition.
>
> Characteristically, parties using the tentative settlement class device have succeeded in minimizing judicial involvement pending completion of the settlement package. Apparently assuming that this absence of early supervision is an inherent part of the tentative settlement class process, the Manual for Complex Litigation concludes that tentative settlement classes "should never be formed." The Manual's basic arguments appear to be that this procedure fails to provide adequate representation of absentees' interests and, as a result, dilutes their

bargaining power; delays the opportunity for class members to pursue individual litigation; and does not generate the information necessary for class members and the judge to evaluate intelligently the settlement proposal. Proponents of the tentative settlement class respond to criticisms by contending that the mechanism is actually helpful to absentees, since it allows them to opt out with knowledge of the specific benefits of remaining in the class. Proponents also contend that settlements of large consumer class actions would not be possible without tentative settlement classes, and that problems of representation in a tentative settlement class are no worse than in any class settlement.

When all class members have individually recoverable claims, a tentative settlement class may be acceptable. In that situation, class members have a genuine option to opt out of the settlement and can benefit from specific knowledge of the amount of recovery they can expect from remaining in the class. Moreover, since a class member with a recoverable claim is likely to have his own attorney and an incentive to investigate his claim, he may be able to make an effective evaluation of the settlement despite the lack of information supplied by the negotiating parties. To the extent that absentees are able to exercise supervision over the settlement, the weak posture of the judge becomes less troubling. On the other hand, large claimants might be able to gather even more detailed information about the actual negotiations if there is early certification with the opportunity to intervene. In addition, an absentee might have his own suit delayed if all similar cases are consolidated for pre-trial proceedings and the judge refuses to allow any discovery until the tentative class settlement has been negotiated. On balance, however, these costs would appear to be offset by the advantage of being able to opt out with knowledge of the benefits of remaining in the class.

In contrast, when a significant number of class members' claims are non-recoverable or nonviable, the Manual's concerns about inadequate representation appear well-founded. Defendants may exploit the possibility of attorney-class conflict by shopping among attorneys who claim to represent the class until they find one with "reasonable" demands. Intra-class conflicts are also likely since both the class attorney and the defendant will often have incentive to stipulate to an overly broad class. The class attorney may want to increase the size of the class in order to maximize his fee. If subsequent class or individual suits are probable, the defendant may want to save litigation costs by quieting all claims with a single payment.

When individual claims [illegible] small, absentees probably will be unable to protect themselves against [illegible]quate representation. Small claimants will seldom be able to hire a lawyer to help them evaluate the offer. Opting out will often be an illusory choice, since the individual cannot afford to bring his own suit and will probably not wish to gamble that a sufficient number of other absentees will opt out to form a new class. Thus, effective judicial supervision becomes vital. The judge's lack of information, however, may prevent him from fulfilling his guardian role."

The passage just cited is supported by copious footnotes. For example, a footnote at the end of the first sentence cites the following authorities:

"See, e.g., Girsh v. Jepson, 521 F. 2d 153 (3d Cir. 1975); City of Detroit v. Grinnell Corp., 495 F. 2d 448, 464-66 (2d Cir. 1974); Greenfield v. Villager Industries, Inc., 483 F. 2d 824, 826 (3d Cir. 1973); In re Four Seasons Sec. Laws Litigation, 58 F.R.D. 19, 31 (W.D. Okla. 1972); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 373 (E.D.Pa. 1970) (preliminary approval), 322 F. Supp. 834 (E.D.Pa.) (final approval), modified on other grounds sub nom. Ace Heating & Plumbing Co. v. Crane Co., 453 F. 2d 30 (3d Cir. 1971). See also Note, The Tentative Settlement Class and Class Action Suits Under Title VII of the Civil Rights Act, 72 Mich. L. Rev. 1462 (1974); Manual, supra note 17, pt. I, par. 1.46, at 43-45."

A footnote to the next to the last sentence in the next to the last paragraph contains the following statement: "The class attorney may not resist a defendant's desire for a large class if the procedure includes some mechanism for easing the financial burden of notice costs."

These considerations are plainly present in this case where C.J.L. has agreed to pay all notice and administration costs (A20) even though, under Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) it had the right to require the plaintiff to bear the full cost of notice. Considering the fact that the defendants are being sued for a large sum of money, the defendants in this case have been agreeable to an extreme. It is submitted that this case provides an excellent example of the abuses which can occur when a tentative settlement class procedure is followed and thereby demonstrates the correctness of the critique found in the Manual for Complex Litigation. For instance, paragraph 1.45 page 37 of the Manual states:

"According to the weight of recent decision, this right of the small claimant to benefit without alone bearing the otherwise prohibitive cost of litigation is the most important procedural right secured by Rule 23. Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S. Ct. 885, 31 L.Ed.2d 184 (1972); Eisen v. Carlisle & Jacquelin, 391 F.2d555 (C.A.2 1968); Hohmann v. Packard Instrument Co., 399 F.2d 711 (C.A.7 1968). The requirement of "opting-in" must, therefore, under Rule 23 as it is presently written, be regarded as a clear abuse of discretion. See Wainwright v. Kraftco Corp., 53 F.R.D. 78, 90 (N.D.Ga. 1971). ("Rule 23(c) places on the court the responsibility of protecting the absent parties.") Requiring a proof of claim under pain of exclusion or dismissal is the same thing as requiring class members to opt in."

In this appeal, this appellant is being put to substantial expense in order to

protect his interests. He can well afford to do so because of the substantial amount of money involved in the outcome of this case. However, most members of the class who have filed claims presumably have a stake of no more than a few hundred dollars and therefore, because of the costs of paying the docket fee and the expense of filing a brief and appendix, not to mention the expense of hiring an attorney, are precluded from bringing any objections they might have to the attention of this court. This in itself demonstrates that the tentative settlement class procedure should not have been followed in this case.

Judge Lasker in this decision expresses familiarity with the suggestions of the Manual but states that he need not follow them since their force "has been considerably muted in this circuit" by City of Detroit v. Grinnell Corp., supra. However, Judge Lasker ignored that decision in as many ways as he followed it. For instance, there the judge evaluated the adequacy of the proposed settlement on the basis of the dollar amount of the claims actually filed and not on the basis of projections by opponents of the settlement as to how much the total damages might be. City of Detroit v. Grinnell Corp., supra, 356 F. Supp. at 1386. In the case presented here, Judge Lasker's decision is primarily concerned with contrasting Plotkin's projection of $30 to $50 million in damages to the proponents estimate of $2.5 million in damages. 416 F. Supp. at 1383. Had Judge Lasker ordered the defendants to tabulate the claims which had been filed, which was well within his power to do, this entire guessing game would have been avoided and presumably it would not have taken Judge Lasker from October 17, 1975 until June 30, 1976 to decide whether to approve the proposed settlement. Moreover, in City of Detroit, supra, a relevant consideration was the fact that the district judge estimated that it would take from 5 to 11 years to try the case, 356 F. Supp. at 1389, 495 F.2d at 457. Here, Judge Lasker stated that he could have tried the entire case in two or three weeks, (A355), and that this case became much

more difficult because of the proposed settlement. (A355). This statement alone demonstrates that this court should not condemn other judges to following the procedures adopted by Judge Lasker here, as it will do if it affirms the judgment below. It is worth noting that Judge Lasker has at least one other case before him in which a tentative settlement class has been created and a motion for approval of a proposed settlement has pending for nearly a year. In that case, where the plaintiff class is being represented by I. Walton Bader, an attorney who, like the Wolf firm, specializes in class action litigation, Judge Lasker made a decision which is included as an exhibit to the joint appendix. (A380). It is respectfully submitted that this decision is illustrative of an error which Judge Lasker apparently regularly makes in cases of this sort and which ought to be corrected by this court.

One of the objections filed by this appellant in the District Court was it was impossible to make an informed decision as to whether to opt out or to accept the settlement. (A60, A66). This objection finds support in the Manual for Complex Litigation, p. 40, which states:

> "The notice itself must adequately describe the proposed settlement and should include the best available information concerning fees and expenses which may be deducted from the gross amount, together with an estimated range of unitary recovery (e.g., amount per share, per unit, per dollar charged, and the like) that members of the class may expect to receive if the settlement is approved."

In this case, no one, including counsel for the plaintiffs and the defendants, who are in a better position to know than anyone, can even make an educated guess as to what the pro rata distribution will be. The lowest estimate of the amount of damages that would be claimed was $2.5 million. When one considers that the gross loss to the class, when claculated according to the formula suggested by the Eighth Circuit in Harris v. American Investment Co., 523 F.2d 220 (8th Cir. 1975), was $25.8 million during the first class period and $13.7 million during the second class period (A272) and that 2/3 of the Settlement Fund of $1.35 million will be distributed to individuals who purchased C.J.L. shares during the second class period, it seems

possible that if the $2.5 million estimate proves to be correct, the claimants in the second class period may obtain a recovery of nearly 100%. However, if, on the other hand, the Plotkin $30 to $50 million projection is correct, then the recovery to those in the first class period would be about 1 % and the recovery to those in the second class period would be in the vicinity of 4%. There is a great difference between 100% and 4% and under these circumstances the settlement proposal was meaningless to anyone who received the notice.

The notice was inadequate and indeed fraudulent in a number of other respects, particularly in its failure to state how the loss of each class member was to be calculated. Also it did not make it clear that cash would be paid instead of warrants and that all of the $1.35 million would be paid by C.J.L. Both of these facts were known to counsel for the parties before the notice was sent out and they should have been disclosed to the class members.

Another objectionable procedure permitted by the District Court concerned the failure and refusal of the parties' counsel to serve the objectors, including this appellant with copies of all filed papers. Even Plotkin, who apparently was served with most of the papers, had occasion to object on this score. (A347). This appellant made a timely demand for papers (A58) and was entitled to receive all briefs and other official filings submitted by any of the full parties during the course of this suit. See e.g. McBroom v. Western Elec. Co., 18 Fed. Rules Serv. 2d 1200, 1203 (M.D.N.C. 1974). This right is an irreducible minimum component of Fed. R. Civ. P. 23(c)(2)(C) intervention. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 391 n. 137 (1967).

POINT V

THIS ACTION, AS PRESENTLY CONSTITUTED, CANNOT BE MAINTAINED AS A CLASS ACTION UNDER RULE 23, FED. R. CIV. P.

Although this point deserves extensive briefing, it will not receive it here. Rather, this court is referred to the recent opinion in Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1341 (2dCir. 1976) (Sneed, J., concurring in part) for an explanation of the many reasons which make this action unmanageable as a class action.

The similarity between these two cases is more than a coincidence. In fact, plaintiff's counsel attached a copy of an opinion in Green v. Occidental Petroleum Corp. to its memorandum in support of a class determination. Both cases concern the market fluctuations in the stocks of natural resources companies who possess the rights to natural resources of questionable existence. For example, in July, 1973, when the price of C.J.L. shares rose from 7 1/4 to 14 5/8, the price of copper on the world commodities markets more than doubled. Investors undoubtedly purchased C.J.L. shares because they believed that C.J.L. had the right to develop a copper mine in Panama. Therefore, had the investing public not been mislead into believing that C.J.L. had the right to exploit a copper discovery in Panama, the price of C.J.L. shares would not have gone up in July, 1973 and this appellant would not now be filing this brief in this court.

The court filings by the proponents of the settlement include ample evidence to demonstrate that this action may not be maintained as a class action. For example, it is pointed out that the plaintiffs in this action allege that due to the fraudulent activities of the defendants, the price of C.J.L. shares was inflated continuously from April 30, 1969 until October 24, 1973 but that, if this is true, anyone who sold his shares prior to October 24, 1973, obtained the benefit of the allegedly inflated price (A254), and this benefit presumably offset the injury suffered as a result of having paid an inflated price when the shares were purchased. The significance of this point if explained in

a letter from Geroge B. Mickum, counsel for C.J.L. and one of the proponents of the settlement, which stated:

> "If this theory is accepted as the basis of plaintiff's class action, it follows inevitably that no person who purchased Canadian Javelin stock can claim any injury or loss attributable to defendants' misrepresentations unless he or she held that stock until after the end of the class period during which it was purchased. The reason is obvious: if the misrepresentations continued to inflate the stock price throughout the class period, then the amount by which the stock price was inflated at the time of purchase would have been offset by the equal or greater inflation of the stock price at the time of resale, provided resale occurred during the class period and thus before "disclosure of the truth." " (A254-A255).

Further evidence that this action cannot be maintained as a class action can be found in the affidavit of Benedict Wolf in support of the proposed settlement. (A95). As Wolf explains the merits of his case, it is so weak as to be almost entirely without basis. The only period during which Wolf expresses any confidence of prevailing aft rial is the period starting with June 22, 1973 (A130). This accounts for the rel vely miniscule settlement afforded to purchasers of C.J.L. shares during the first class period, who are permitted to receive only half as much as those who purchased during the second class period although their gross losses were nearly twice as great. The lack of confidence in his case demonstrates that Wolf is not capable of providing adequate representation to purchasers of C.J.L. shares prior to June 22, 1973 and hence this action is not maintainable as a class action.

A quotation from page 1575 of the May, 1976 Harvard Law Review is appropriate here:

> "while the class lawyer will be expected to take a less enthusiastic stance on his case once he becomes a settlement proponent, a sharp reversal of position without any apparent basis in discovery or new case law should be suspect as evidence of a possible sell-out. "

No claim can be made, however, that Wolf is deliberately selling out his class. The plaintiff's case with respect to the first class period is simply not meritorious. For example, although the price of C.J.L. shares declined substantially

during this period, it declined less than the Standard and Poor's Low Price Stock Average and only slightly more than the Value Line Industrial Average (A186). Also, plaintiff Bonime purchased her shares at 8 3/8, which was near the low for the entire period (A257-A259) and can hardly be said to be representative of a class which includes persons who paid more than double that price for their C.J.L. shares. cf. Elkind v. Liggett & Myers, Inc., 66 F.R.D. 36, 42 (S.D.N.Y. 1975).

In view of the small portion of the Settlement Fund used to satisfy the claims of those who purchased C.J.L. shares during the first class period, it is apparent that the only purpose the inclusion of purchasers during the first class period serves is to make it more attractive for the defendants to settle while increasing the risk to the defendants if they chose to contest the suit. See, e.g., Katerincic & McClain, Federal Class Actions Under Rule 23: How to Improve the Merits of Your Action Without Improving the Merits of Your Claim, 33 U. Pitt. L. Rev. 429, 432 (1972). Clearly, this court should not allow a class action to proceed on this improper basis.

POINT VI

THE CRITERIA OF THE DISTRICT COURT FOR DETERMINING THE FAIRNESS OF THE SETTLEMENT WERE NOT CORRECT.

In view of the arguments already presented, this point made here does not require a detailed explanation. Judge Lasker's opinion characterizes the settlement approved by him as "rough justice." In this case, justice was a bit too rough. There was a relatively scientific method available to Judge Lasker by which he could have determined the adequacy of the settlement, which was to require a tabulation of the filed proof of claims and a computation of how much each claimant would get. With this information available, Judge Lasker could have made a rational determination as to whether the proposed settlement was adequate. As matters stand, no purpose was served in requiring that members of the plaintiff class file proofs of claim.

POINT VII

THIS COURT SHOULD ORDER PLAINTIFFS' COUNSEL TO REDEFINE THE CLASS AS A CONDITION TO PERMITTING THIS ACTION TO PROCEED.

As noted several times previously, plaintiffs' counsel has filed an affidavit stating that the only period during which a strong case can be made starts on June 22, 1973 and continues through October 24, 1973. (A130). Accordingly, this is the only class period for which plaintiffs' counsel is capable of providing adequate representation to the class. Therefore, this court should order the class redefined to include only this period, as this court can do under its general equitable power over the management of a class action. Zients v. La Morte, 459 F. 2d 628 (2d Cir. 1972). This would be a highly satisfactory result for this appellant because the period from June 22, 1973 to October 24, 1973 happens to be precisely the period during which this appellant suffered his losses in trading C.J.L. shares.

The principle virtue of permitting class actions to exist is to enable individuals such as this appellant to obtain the representation of high caliber counsel which they otherwise would not be able to afford. That situation applies here because this appellant has litigated cases pro se not by choice but because of the prohibitive cost of employing competent counsel practicing in the securities field.

CONCLUSION

For all of the reasons set forth above, the judgment of the district court should be reversed and this case should be remanded for further proceedings.

Samuel H. Sloan

Dated: January 3, 1977

SAMUEL H. SLOAN
1761 Eastburn Avenue #A5
Bronx, New York 10457
(212) 299-2095

SLOAN

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 7 day of Jan. 1977 deponent served the within ~~1976~~ Br Brief upon

Wolf, Popper, Ross, Wolf & Jones, Esqs.
Diamond & Golomb, P.C. and
Steptoe & Johnson, Esqs.

attorney(s) for
Appellees

in this action, at
845 Third Ave., New York, NY 10022;
99 Park Ave., NYC 10016 and
1250 Connecticut Ave., N.W., Washington, D.C. 20036

the address(es) designated by said attorney(s) for that purpose by depositing

___1___ copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 7 day
of Jan. ~~1976~~ 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978